



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA-HQ-OW-2012-0142; FRL-9705-6]

RIN 2040-AF40

National Pollutant Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is amending its regulations to eliminate the requirement that an owner or operator of a Concentrated Animal Feeding Operation (CAFO) that “proposes to discharge” must apply for a National Pollutant Discharge Elimination System (NPDES) Permit. This rulemaking also removes the voluntary certification option for unpermitted CAFOs because removal of the “propose to discharge” requirement renders the certification option unnecessary. Its purpose had been to allow CAFO owners and operators to certify that they were not violating the requirement that owners or operators of CAFOs that propose to discharge must seek permit coverage. Both of these provisions were included in the EPA’s rulemaking entitled “Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent

Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision,” (the 2008 CAFO Rule).

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE **Federal Register**].

ADDRESSES: The record for this rulemaking is available for inspection and copying at the Water Docket, located at the EPA Docket Center (EPA/ DC), EPA West 1301 Constitution Ave., NW, Washington, DC 20004. The record is also available via the EPA Dockets at <http://www.regulations.gov> under docket number EPA-HQ-OW-2012-0142. The rule and key supporting documents are also available electronically on the Internet at <http://www.epa.gov/npdes/caforule>.

FOR FURTHER INFORMATION CONTACT: For further information contact Louis Eby, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460, telephone number: (202) 564–6599, e-mail address: eby.louis@epa.gov.

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I. General Information

A. Does This Action Apply to Me?

This action applies to CAFOs as specified in section 502(14) of the Clean Water Act (CWA), 33 U.S.C. 1362(14) and defined in the NPDES regulations at 40 CFR 122.23. Table 1.1 provides a list of standard industrial codes for operations potentially regulated under this revised rule. The rule also applies to States and Tribes with authorized NPDES Programs.

TABLE 1.1 – OPERATIONS POTENTIALLY REGULATED BY THIS RULE

Category	Examples of regulated entities	North American Industry Classification System (NAICS)	Standard Industrial Classification (SIC)
Industry	Operators of animal production operations that meet the definition of a CAFO: Beef cattle feedlots (including veal calves) Beef cattle ranching and farming Hogs Sheep and Goats General livestock except dairy and poultry Dairy farms..... Broilers, fryers, and roaster chickens Chicken eggs Turkey and turkey eggs Poultry hatcheries Poultry and eggs Ducks Horses and other equines	 112112 112111 11221 11241,11242 11299 11212 11232 11231 11233 11234 11239 11239 11292	 0211 0212 0213 0214 0219 0241 0251 0252 0253 0254 0259 0259 0272

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility would be affected by this action, you should carefully examine the definitions and other provisions of 40 CFR 122.23.

II. Background and Rationale for Action

On November 20, 2008, the EPA published a final rule (73 FR 70418) that revised the NPDES permitting requirements and Effluent Limitations Guidelines and Standards for CAFOs in response to the order issued by the U.S. Court of Appeals for the Second Circuit in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The 2008 CAFO Rule included a number of changes, including a requirement that CAFO owners or operators that discharge or propose to discharge must apply for an NPDES permit. The 2008 CAFO Rule also

created a voluntary option for unpermitted CAFO owners and operators to certify to the permitting authority that the CAFO does not discharge or propose to discharge.

On March 15, 2011, the United States Court of Appeals for the Fifth Circuit (the Court) issued an opinion that, among other things, vacated those portions of the 2008 CAFO Rule requiring CAFOs that propose to discharge to apply for an NPDES permit. *National Pork Producers Council v. EPA*, 635 F.3d 738, 756 (5th Cir. 2011). This action removes from the Code of Federal Regulations (CFR) the specific “propose to discharge” requirement in 40 CFR 122.23(d).

Today’s action also deletes the timing requirements in 40 CFR 122.23(f) related to when CAFO owners and operators must seek coverage under an NPDES permit. These provisions extended the time by which facilities newly required to obtain NPDES permits must apply for a permit. The date-specific deadlines in those sections have passed. The revision clarifies that all CAFOs must have a permit at the time that they discharge.

The rule also removes 40 CFR 122.23(g) to make conforming changes to EPA’s requirements for renewing permit coverage.

Also, this action removes from the CFR the option in 40 CFR 122.23(i) and (j) for owners and operators to voluntarily certify that a CAFO does not discharge or propose to discharge. The option provides that properly certified CAFOs would “not be in violation of the requirement that CAFOs that propose to discharge seek permit coverage....” Removing the requirement that CAFOs apply for permits if they “propose to discharge” renders the option to certify unnecessary and therefore the EPA is eliminating it.

The EPA is not providing an opportunity for comment on this final rule. The Administrative Procedure Act of 1946 (APA) makes provision for the procedural path we are following in this

action. In general, the APA requires that general notice of proposed rulemaking shall be published in the Federal Register. Such notice must provide an opportunity for public participation in the rulemaking process. The APA does provide an avenue for an agency to directly issue a final rulemaking in certain specific instances. This may occur, in particular, when an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. See 5 U.S.C. 553(b)(3)(B).

The EPA finds that a notice-and-comment rulemaking is unnecessary and not in the public interest because this action is ministerial in nature. The EPA has no discretion given the specific circumstances presented in the Court's opinion. The EPA is bound by the decisions of the court and must act in accordance with that decision. The EPA accepts the decision of the Court that vacated the requirement that CAFOs that propose to discharge apply for NPDES permits and the EPA lacks discretion to reach a different conclusion. Providing an opportunity for notice and comment is therefore unnecessary and would not serve any public interest.

III. Implementation

For the reasons cited above, the EPA is making this action effective upon publication. See 5 U.S.C. 553(d)(3). This action removes content from the CFR that has been found to be contrary to the CWA by a United States Court of Appeals. This is a ministerial but necessary action on the part of the EPA. Given the EPA's lack of discretion in this matter, the EPA has good cause to act in the public interest to implement the court's remedy by amending the CFR without delay.

The deadline has passed by which states were required to make any changes to their approved state NPDES program legal authorities necessary to conform to the 2008 CAFO Rule. States that have not yet done so must make the necessary changes to conform to the 2008 CAFO Rule, less the vacated provisions.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866 (Regulatory Planning and Executive Order 13563: Improving Regulation and Regulatory Review)

This rule withdraws Federal requirements applicable to CAFOs that propose to discharge as well as the option to certify that a CAFO does not discharge or propose to discharge. It imposes no regulatory requirements on any person or entity, does not interfere with the action or planned action of another agency, and does not have any budgetary impacts or raise novel legal or policy issues. The rule imposes no additional cost on the regulated community. The rule imposes no additional effort on the State regulators. Thus, this rule is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011) and is therefore not subject to review under the Executive Orders.

B. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), because it is administratively withdrawing Federal requirements.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. Although the rule is subject to the APA, the Agency has invoked the “good cause” exemption under 5 USC 553(b), therefore it is not subject to the notice and comment requirement.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. Similarly, the EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments and is therefore not subject to UMRA section 203.

E. Executive Order 13132 (Federalism)

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include

regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule imposes no regulatory requirements on any State, Tribal, or local government. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (59 FR 22951, November 9, 2000), requires the EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This rule does not have tribal implications, as specified in Executive Order 13175. It imposes no regulatory requirements or costs on any Tribal government. It does not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045 (Protection of Children from Environmental Health and Safety Risks)

This rule is not subject to Executive Order 13045, entitled “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866, and the EPA has no reason to believe the environmental health or safety risks addressed by this rule present a disproportionate risk to children.

H. Executive Order 13211 (Actions That Significantly Affect Energy Supply, Distribution, or Use)

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations)

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it merely removes regulations that were vacated by the U.S. Court of Appeals and, therefore, does not affect the level of protection provided to human health or the environment.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be

supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefor, and established an effective date of [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

V. Statutory Authority

This rule is issued under the authority of sections 101, 301, 304, 306, 308, 402, and 501 of the CWA. 33 U.S.C. 1251, 1311, 1314, 1316, 1317, 1318, 1342, and 1361.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: July 19, 2012

Lisa P. Jackson,

Administrator

For the reasons set out in the preamble, 40 CFR part 122 is amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL
POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 et seq.

2. Section 122.23 is amended as follows:

- a. By revising the heading of paragraph (d).
- b. By revising paragraph (d)(1).
- c. By revising paragraph (f).
- d. By removing and reserving paragraph (g).
- e. By removing paragraphs (i) and (j).

§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).

* * * * *

(d) *NPDES permit authorization.*—(1) *Permit Requirement.* A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an

NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.

* * * * *

(f) *By when must the owner or operator of a CAFO have an NPDES permit if it discharges?* A CAFO must be covered by a permit at the time that it discharges.

* * * * *

[FR Doc. 2012-18378 Filed 07/27/2012 at 8:45 am; Publication Date: 07/30/2012]